IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY, also known as BLUE SHIELD OF TEXAS, et al.,

Petitioners,

vs.

ROYAL DRUG COMPANY, INC., doing business as ROYAL PHARMACY OF CASTLE HILLS and DISCO PRESCRIPTION PHARMACY, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATE OF OHIO AS AMICUS CURIAE

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This brief is filed for the State of Ohio by its Attorney General in support of Respondents, pursuant to Supreme Court Rule 42(4).

Interest Of Amicus

The Attorney General of Ohio is the chief law officer for the State of Ohio and is specifically charged with representing the State's fundamental commitment to antitrust policy in state and federal courts. Ohio Rev. Code Sections 109.02 and 109.81 (Page 1978). This case is of direct interest to the State of Ohio in two ways.

First, Petitioners' attempt to extend the McCarran Act antitrust exemption to non-insurance businesses where competitive policy should prevail runs directly counter to the State's general interest in maximizing the role of the market system.

Second, the State of Ohio is actively committed to using market forces and vigorous antitrust enforcement as methods of cost containment in the health care industry. See Borsody, "Hospitals Enter Antitrust Era," 52 *Hospitals* 59, 60 (May 1, 1978). Prior to 1975, federal and state antitrust enforcement in the health care industry had been virtually nonexistent for the 23 years following *U.S. V. Oregon State Medical Society,* 343 U.S. 326 (1952).

On July 9, 1975, the State of Ohio filed an antitrust action against the Ohio State Medical Association and its wholly owned Blue Sheild subsidiary, Ohio Medical Indemnity, Inc. The suit asserts that the Medical Association has used its wholly owned Blue Shield subsidiary, Ohio Medical Indemnity, Inc. services market, and should be forced to divest the company in order to restore competitive market forces. See, The Skyrocketing Cost of Health Care: The Role of Blue Shield, *Hearings Before Subcomm. on Oversight & Investigations, H. Comm. on Interstate & Foreign Commerce,* 95th Cong., 2d Sess. (1978) (testimony of Attorney General William J. Brown). On the anticompetitive origins and impact of physician dominated Blue Shield plans generally, see, Goldberg & Greenberg, "The Effect of Physician-Controlled Health Insurance," *J. Health Politics, Policy & Law* 48 (1977) and Council on Wage & Price Stability, *A Study of Physicians' Fees* 31 (March, 1978).

In September, 1976 the District Court held the McCarran Act should not be extended to the principal defendant, the Ohio State Medical Association, while granting immunity to the Blue Shield plan. *Ohio v. Ohio Medical Indemnity, Inc.*, 1976-2 Trade Cases paragraph 61, 128 (S.D. Ohio). Although the cases are distinguishable, Petitioners' expansive reading of the "business of insurance" to encompass an alleged pharmacy-insurer conspiracy could jeopardize the State of Ohio's case against the Ohio State Medical Association. Since Ohio's Blue Shield litigation is a vital part of the State's effort to arrest the rising cost of health care and to apply market forces to the medical marketplace, the State has filed this *amicus* brief on behalf of Respondents.

Summary Of Argument

The McCarran Act was solely intended to preserve state insurance department regulation and taxation of the *insurance business,* as the plain meaning of the key phrase "business of insurance" denotes. There is not a shred of evidence, and much to the contrary, that Congress ever considered state insurance departments to have the requisite authority, expertise or incentives to regulate the retail drug market or any other non-insurance business. If states choose to regulate other businesses through their insurance departments, then the *Parker v. Brown* doctrine is better suited for determining inter-industry antitrust exemptions and will fully protect state cost containment programs directed at the health care industry.

More specifically, a careful review of the McCarran Act's genesis, its purpose, its language, Congress' concept of state insurance department regulation, the nature of Texas' insurance regulation here and relevant Supreme Court precedent cumulatively establishes that Congress never intended the "business of insurance" to cover trade restraints imposed on non-insurance businesses.

Contrary to Petitioners' claim, the McCarran Act was not passed to effect a return to the pattern of exclusive state supervision of insurance that existed before this Court's decision in *U.S. v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Congress rejected a blanket federal antitrust exemption for insurance. Instead, Congress adopted the entirely different approach of the National Association of Insurance Commissioners

("NAIC"), which was to preserve state regulation of insurance without emasculating the federal antitrust laws. Accordingly, the McCarran Act reflects federalist policies, with state policy generally prevailing over federal in the event of a conflict.

Congressional concerns were confined entirely to the insurance industry, so that the terms "business of insurance" and "every person engaged therein" had a plain and unambiguous meaning. Insurance was a self-contained business operating primarily on the basis of actuarially determined costs beyond the industry's control. Blue Shield plans were then so new and so different from traditional insurance, with their participating provider contracts and physician control, that they were generally not even considered a form of "insurance."

Similarly, Congress only recognized the expertise of state insurance departments insofar as they regulated the insurance business. Congress never intended the McCarran Act to cover state insurance department regulation of non-insurance businesses. General antitrust principles expressed by this Court directly support limiting the McCarran Act to state regulation of the insurance business, thus avoiding, for example, the danger that state insurance departments will favor their regulated industry at the expense of unregulated commerce such as the pharmacy market.

The Court's *National Securities* decision is faithful to Congress' specific focus on the insurance industry and does not support Petitioners' effort to include virtually any industry doing business with insurers within the "business of insurance."

The Texas State Board of Insurance approval of Blue Shield's pharmacy policies constitutes traditional insurance department regulation of the insurer-insured relationship. Texas' mere approval of the policies as to their impact on policyholders does not manifest a policy to restrain trade in the competitive retail drug market. Petitioners' alleged trade restraints on the pharmacy market are thus outside the "business of insurance."

The McCarran Act specifically provides that an antitrust exemption is available to "every person engaged" in the "business of insurance". Yet, the alleged conspiracy in this case involves Blue Shield and pharmacists who are not themselves engaged in the business of insurance. As this Court recently reiterated in *National Broiler Marketing Assn. v. U.S.*, 46 U.S.L.W. 4620 (June 13, 1978) when an otherwise exempted party combines with a non-exempt party to violate the antitrust laws, then neither party may claim the antitrust exemption.

Congress' unmistakable intention of confining the McCarran Act to the ordinary meaning of the "business of insurance" cannot be overcome by dire predictions about the demise of cost containment measures by the states and by insurers. First, Congressional intentions are controlling in the interpretation of statutes. Second, the dire predictions are simply unfounded, since the *Parker* doctrine and normal antitrust case law make clear that legitimate cost containment efforts by health insurers and the states are fully protected and permissible.

I.

CONGRESS NEVER INTENDED THE "BUSINESS OF INSURANCE" TO COVER TRADE RESTRAINTS IMPOSED ON NON-INSURANCE BUSINESSES.

A. Introduction: The Federalist Nature of the McCarran Act

Petitioners demonstrate a fundamental misunderstanding of the history and purposes of the McCarran Act when they argue that the Act granted insurance regulation "exclusively to the states" and "explicitly renounced the exercise of such power in deference to state regulation." Pet. Brief 12, 17. (Footnote omitted.) As a result, a brief analysis of the Act's history, language and purposes is in order.

Contrary to Petitioners' assertions, the McCarran Act is grounded on a fundamentally federalist policy of accommodating federal and state authority over insurance, with state policy generally prevailing over federal when there is a conflict.

The history of the McCarran Act may be traced to November, 1942 when an antitrust indictment was returned against the South-Eastern Underwriters Association ("S.E.U.A."). The indictment attacked a fire insurance company cartel that fixed premium rates and boycotted non-complying insurers, agents and policyholders. *U.S. v. South-Eastern Underwriters Assn.*, 322 U.S. 533-36 (1944).

Congressional responses to the S.E.U.A. litigation followed two distinct approaches. The first approach was to totally exempt the insurance industry from the federal antitrust laws, and lasted from fall, 1943 to fall, 1944. [1] Central to the defeat of a blanket antitrust exemption for insurance were three factors: Senate opposition, the certainty of President Roosevelt's

1 Extensive hearings on the total exemption bills were held between October, 1943 and June, 1944. See Joint Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 1362, H.R. 3269 & H.R. 3270, 78th Cong., 1st Sess. The Senate rejected the total exemption bills on September 21, 1944. [90 Cong. 6565 (1944).]

veto [2], and general opposition by the insurance industry and state insurance commissioners. Mertz, "The First Twenty Years--A Case-Law Commentary on Insurance Regulation Under the Commerce Clause", *1963-64 Proc., ABA Sec. on Ins., Neg. & Comp. L.* 153, 157. The notion of exclusive state supervision of insurance died with the total exemption bills in the fall of 1944.

The second stage of Congressional reaction to S.E.U.A. was the entirely different approach of the National Association of Insurance Commissioners ("NAIC"), a phase which began in the fall of 1944 and ended with the enactment of the McCarran Act in March, 1945. The NAIC's basic purpose was simply to preserve state regulation and taxation of insurance without emasculating the federal antitrust laws:

> The decision of the United States Supreme Court in the South-Eastern Underwriters case confronted Congress, the State Legislatures and the Insurance Commissioners with a problem -- *the task of preserving state regulation of insurance and at the same time not emasculating the federal anti-trust laws.* [NAIC, *Monitoring Competition* 23 (1974). (Emphasis added.)]

They never sought nor did Congress ever consider again exclusive state jurisdiction. [3] Instead, a fundamentally federalist, two-pronged approach of accommodating federal and state authority over insurance was taken by the NAIC and expressly adopted by Congress in the McCarran Act. First, Commerce

[2] Rep. Hancock, a vigorous proponent of the total exemption approach, admitted as much:

> I was a strong supporter last year of the Walter bill, and I would support it today, plus the provision with reference to taxes. *But we believe we cannot pass that bill as the Senate is now constituted, and we are told with some assurance that the President would veto it.* [91 Cong. Rec. 1087 (Feb. 14, 1945). (Emphasis added.)]

[3] As one influential trade journal observed:

> The commissioners are in accord, but nowhere does it appear that they are for *exclusive* supervision of insurance by the States to the utter and complete exclusion of any sort or kind of Federal jurisdiction. Doubtless they see the handwriting on the wall. [Spectator Prop. Ins. Rev., November 30, 1944 at 5. See also, e.g., NAIC, *Monitoring Competition* at 35 (1974) & 91 Cong. Rec. 478 (1945) (Senators McKellar & Ferguson).]

Clause threats to the existence of state insurance supervision were removed, and second, state primacy in the event of a conflict with federal policy was generally established.

The first task is the subject of sections 1 and 2 (a) of the NAIC bill and the McCarran Act, which were specifically tailored solely to preserve state regulation and taxation from the Commerce Clause threats raised by the Court's *S.E.U.A.* decision. [4] Three House and Senate reports [5] demonstrate that Congressional purposes were the same as the NAIC's, as this Court observed in its first McCarran Act decision: [6]

> [T]hough Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by *removing obstacles* to state action arising from its own action or by *consenting* to such laws, H.Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation *to sustain it from any attack under the commerce clause* to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

[4] The long neglected but vital NAIC memorandum of law demonstrating this proposition is reprinted with the original NAIC bill and other material at 90 Cong. Rec. A 4403 - 08 (November 16, 1944). See generally Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 *Duke L. Rev.* (forthcoming.) For a comparison of the NAIC Bill to the McCarran Act, see *1945 NAIC Proceedings* 157-60.

[5] H.R. Rep. 143 at 3; H.R. Rep. 68 at 2; and S. Rep. 20 at 1-2, 79th Cong., 1st Sess. (1945).

[6] *Prudential Ins. Co. V. Benjamin,* 328 U.S. 408, 430-31 (1946). The Court's "removing obstacles" and "consenting" language refer to the Commerce Clause doctrines of silence and consent upon which the NAIC specifically based sections 1 and 2 of the McCarran Act. See NAIC legal memorandum reprinted at 90 Cong. Rec. A 4406-08 (November 16, 1944).

The second task was to "minimize conflict" [7] between federal and state policy and, in the event of a conflict, to provide that state policy prevails. These prinicples are basically codified in section 2(b)'s "invalidate, impair, or supersede" language. [8] This unmistakably federalist provision, calling for the accommodation of federal and state authority whenever possible and for preemption only in the event of an irreconcilable conflict, apply to the federal antitrust laws by virtue of section 2(b)'s unambiguous terms and history. [9]

7 *Id.* at A 4407. Section 2(b) applies to all federal statutes except as provided in sections 3 and 4. On federalism generally, see *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 127 (1973).

8 Section 2(b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance, *Provided,* That. . . the Sherman Act, . . . the Clayton Act, and the. . . Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

9 Section 2(b) as originally proposed by the NAIC and introduced as S. 340 by Senators McCarran and Ferguson consisted of the first clause alone and applied to the Sherman and Clayton antitrust laws. The House accepted this standard for the antitrust laws. See H.R. Rep. 143, 79th Cong., 1st Sess. (1945) and *Insurance Field-Life ed.,* February 9, 1945 at 3, 27-28. On the other hand, the Senate demanded the states act consistently with the Sherman and Clayton Acts and passed S. 340 with an amendment deleting them from section 2(b)'s standard. 91 Cong. Rec. 488 (Jan. 25, 1945). The proviso clause emerged as the compromise between the House and Senate versions of section 2(b). See 91 Cong. Rec. 1396, 1442-44, 1477-89 (1945).

This generally neglected but highly significant evolution of section 2(b) proves that the standards of both clauses must be met before federal antitrust immunity under the McCarran Act should be granted. All of the evidence indicates that the House-Senate compromise added the proviso to tighten, certainly not to loosen, the "invalidate, impair, or supersede" test the House had agreed to apply to the Sherman and Clayton antitrust laws. See generally Weller, *supra.*

True to Congressional purposes, this Court established at the outset of McCarran Act jurisprudence that principles of federalism favoring the accommodation of federal and state authority are to be applied in construing the Act:

> The versality with which argument inverts state and national power, each in alternation to ward off the other's incidence, is not simply a product of protective self-interest. *It is a recurring manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends. [Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 413 (1946). (Footnote omitted.)]

The McCarran Act also served to harmonize federal and state authority over insurance in two additional and vitally important ways that are easily overlooked with the passage of time. First, the Act made clear that the activist Roosevelt administration would *not* usurp state insurance commissioners and establish a federal insurance regulatory agency, at least for the present. The fear of federal obliteration of state insurance departments either through the enactment of a federal regulatory statute or by operation of the Commerce Clause was the brooding omnipresence that singularly motivated the NAIC at the time. [10] Second, although section 3(a)'s moratorium provision has long since lasped, it was of critical importance at the time. The Roosevelt administration fought for a short moratorium to limit what amounted to a complete antitrust exemption to as short a time as possible and to avoid the running of the statute of limitations. Others argued, successfully, for a longer moratorium for the states and the insurance industry to come into compliance with the Act and *SEUA.* See, e.g., 45 *Best's Life News* 12 (Jan., 1945).

Thus the McCarran Act constitutes a far narrower response to the *S.E.U.A.* litigation than Petitioners assert. The political mood of the time eliminated anything resembling a blanket antitrust exemption for insurance, resulting in a text carefully grounded in federalist principles and intended to preserve state regulation and taxation without emasculating the federal antitrust laws.

10 See, e.g., Senator Ferguson spoke of federal officials "licking their chops" to regulate insurance in an address to the NAIC. *1947 NAIC Proc.* 69, 74. See also, e.g., *S.E.U.A.,* 322 U.S. 586 (J. Jackson, dissenting).

B. Congress Used the "Business of Insurance" In Its Ordinary Sense To Refer To The Insurance Industry And Never Understood It To Embrace Trade Restraints Imposed On Non-Insurance Markets

The phrase "business of insurance," like the McCarran Act itself, has its roots in the *South-Eastern Underwriters* litigation. The price fixing conspiracy among insurance companies challenged there was wholly intra-industry and this same intra-industry focus prevailed throughout Congressional deliberations leading to the passage of the McCarran Act. Insurance companies, agents, brokers and adjusters were the principal "persons engaged" in the "business of insurance" under section 2(a) and concerted statistical programs, ratemaking, agent and broker commission setting, reinsurance and claims adjustment were the "business of insurance" activities considered to be most threatened by the antitrust laws. See, e.g., section 4(b) of the original NAIC Bill, reprinted at 90 Cong. Rec. A4406 (Nov. 16, 1944). Insurance company rating bureaus supervised by state insurance departments in particular were Congress' main concern. See, e.g., *SEC. v. National Securities, Inc.*, 393 U.S. 453, 458 (1969) & 91 Cong. Rec. 1481 (Sen. Ferguson). The "business of insurance" had a plain and straightforward meaning at that time because insurance was a self-contained business operating largely on the basis of actuarially determined costs beyond their control. As a House Report on the total exemption bills stated:

> The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors. [H. R. Rep. 873, 78th Cong., 1st Sess. 8-9 (1943).]

Congress never considered the issue of trade restraints imposed outside the insurance business, let alone state insurance department regulation of inter-industry restraints of trade.

Nor did Congress ever consider the novel Blue Cross and Blue Shield plans, which were then in their infancy and distinct from traditional forms of insurance: [11]

> [11] R. Eilers, *Regulation of Blue Cross and Blue Shield Plans* 13 (1963) (the same was true for the later Blue Shield plans, *id.* at 80-95). The Blues were also distinct from traditional insurers in that they were controlled by doctors and hospitals.

> From their early beginnings, and to the present day, Blue Cross plans and insurance companies have taken divergent approaches to the problem of protecting against medical care expenses. As one example, Blue Cross has employed "service-type" benefits while insurance companies have sold "cash-indemnity" policies.

The Blues' distinctive "service-type benefits" were rendered through participating provider contracts like those involved in this case. These unique arrangements were so new and so different from traditional forms of insurance that they, let alone their anticompetitive effects on medical markets, were never considered by Congress.

Indeed, the insurance industry held coverage for medical expenses as sold by the "Blues" in "complete. . .disdain" and did not consider it "insurance." Eilers, *supra,* at 13. The "Blues" themselves vigorously argued that they were not insurance but "medical prepayment plans" in order to avoid state insurance regulation and taxation. [12] And the majority of state courts considering the issue have held the Blues are not "insurance." *Id.*

Petitioners spend nearly one third of their argument trying to show that Blue Shield policies are "insurance" without making the slightest reference to this adverse precedent and history. Pet. Brief 20-27. Apparently desperate to show that Blue Shield was "insurance" and that trade restraints imposed on non-insurance markets were considered by Congress, Petitioners invoke Attorney General Biddle's testimony regarding the *American Medical Association* case that health maintenance organizations are a form of insurance. The Petitioners' convoluted argument simply misses the mark. First, the HMO in the *AMA* case was held *not* to be a form of "insurance." *Jordan v. Group Health Assn.*, 107 F. 2d 239 (1939). Second, Congress never addressed in the *AMA* context or anywhere else the profound issues here concerning inter-industry trade restraints. Attorney General Biddle's remarks were solely used to justify the *S.E.U.A.* indictments prior to the Supreme Court's decision in that case.

> [12] See generally Denenberg, "The Legal Definition of Insurance," 30 J. Insurance 319, 322 (1963). See also Peart & Hassard, "The Organization of California Physicians' Service," 6 *L. & Contem. P.* 565, 569-71 (1939) (California's was the first Blue Shield plan) & Starkweather, "Regulation of Health Insurance: A Review," 27 *Medical Care Rev.* 335 (1970).

The unique nature of Blue Shield plans and the considerable authority holding that they are not a form of "insurance" is sufficient under rulings by this Court to hold the McCarran Act inapplicable to petitioners. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1973). It would be both ironic and unjust to provide McCarran Act protection to Blue Shield plans that sought to avoid the very insurance department taxation and regulation the McCarran Act was passed to preserve. Alternatively [13], the novelty of Blue Shield plans and their non-insurance status at the time of the McCarran Act's passage underscores the conclusion that the "business of insurance" had a plain meaning to Congress with distinct boundaries -- the insurance industry. Trade restraints imposed on non-insurance businesses such as pharmacies were never understood to be part of the "business of insurance."

C. While Congress Recognized The Expertise of State Insurance Departments To Regulate The Insurance Industry It Never Deferred To Their Authority Or Expertise In Regulating Non-Insurance Businesses

Operating from the basic principle that express or implied "exemptions from antitrust laws are strictly construed," [14] this Court has refused to extend antitrust exemptions in directly analogous contexts involving other regulated industries. Even though an exemption applies in whole or in part to activities of a firm in a regulated market the Court has not extended the exemption to other markets with which the firm does business. See, e.g., *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596, (1976). Antitrust laws have been applied in relationships with both customers or suppliers even though a regulatory exemption exists at one of the horizontal levels. See, e.g., *Otter Tail, supra and Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

13 The two issues are distinct, since activities related to an "insurance" product need not be within the "business of insurance." See *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969). The inapplicability of the McCarran Act on either ground would still permit state regulation to provide antitrust immunity under the *Parker v. Brown* doctrine. For sake of argument, it will be assumed that Blue Shield policies are "insurance" for the duration of this brief.

14 *Fed. Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

Similarly, the antitrust laws have been applied to relations between regulated industries, such as trucks and railroads, radio and television, and banks and savings and loan associations, so that inter-industry competition is maintained even though intra-industry competition is dampened by regulation. See generally L. Sullivan, *Handbook of the Law of Antitrust* 745-46 (1977).

A recent Ninth Circuit decision has incisively analysed these issues in a manner directly applicable to the instant case. *Foremost International Tours, Inc. v. Quantas Airways Ltd.*, 525 F. 2d 281 (1975), cert. denied 429 U.S. 816 (1976), involved allegations that Quantas Airlines acted outside the regulated air carrier industry and monopolized the tour industry. Sharply distinguishing the case where the anticompetitive effects are confined to the regulated industry, the Court held that Quantas was not entitled to federal antitrust immunity for anticompetitive conduct imposed outside the regulated industry:

> In this case, while the CAB has authority over Quantas, and arguably has the means to enforce an order against Quantas should it so choose, in lacking authority over all the parties, it cannot make the accommodations and effect the compromises which are the hallmark of agency regulation. It may well lack the means to deal with the total problem. But more importantly, *the regulatory agency here also lacks the expertise and the incentive (--after all it is not its industry--) to act on an inter-industry problem. There is the danger that in cases such as this the regulatory agency might favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority.* [525 F. 2d at 285. (Emphasis added.)]

Sound statutory construction and a parity of reasoning and policy requires a similar interpretation of the McCarran Act under the facts in this case. State insurance departments only have the authority, expertise, and incentives to regulate the insurance business. In passing the McCarran Act, Congress never recognized any special ability of state insurance departments to regulate pharmacies, auto repair shops, hospitals, dentists, doctors or lawyers. Nor did Congress ever intimate that the special needs of the insurance industry transcended that business and must include the ability to restrain trade in any other sectors of

the economy. Indeed, as suggested in *Quantas,* there is a real danger that state insurance departments not only lack the authority and expertise to regulate other businesses, they are apt to favor the parochial interests of their industry at the expense of others. Trade restraints on non-insurance businesses, for example, might be viewed favorably if they added to the stability and financial security of an insurer. [15] The "business of insurance" should be restricted to its plain meaning and inter-industry trade restraints involving departments should be tested under *Parker v. Brown,* not McCarran Act, standards.

Petitioners' principal argument for a virtually unlimited rendering of the "business of insurance" is based on a myopic reading of this Court's *National Securities* opinion. Their note by note rendition of words in that opinion -- "type of policy," "reliability and enforcement," "status as a reliable insurer" -- produces a dissonant reading of the McCarran Act. Reduced to its essence, they ask this Court to grant insurers and to anyone who acts in concert with them a "Midas touch" in the form of monopoly privileges over any industry they come in contact with. Under Petitioners' boundless concept of the "business of insurance," insurers and their cohorts would have monopoly privileges whenever a non-insurance business affects insurance policies or rates. [16] Since every expense of operating an insurance company necessarily affects insurance rates, it is doubtful that even the pen, pencil and paper clip industries would escape

15 As the Court recently stated in an analogous context:

> If municipalities were free to make economic choices counseled solely by their own prochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. *[City of Lafayette v. La. Power & Light Co.,* 55 L. Ed. 2d 364, 379-80 (1978) (Footnote omitted.)]

16 The McCarran Act's "state regulation" requirement as construed by the lower courts does not change or diminish the breadth of this proposition. "[I]n no case has it been decided that the exemption was inapplicable because of a failure of state regulation." *Ohio AFL-CIO v. Ins. Rating Bd.,* 451 F.2d 1178, 1183 (6th Cir. 1971). Although this Court can and should tighten the "state regulation" requirement consistent with Congreaaional purposes, see Weller, *supra,* the "business of insurance" should not be extended beyond its Congressionally intended plain meaning.

Petitioners' claimed monoply prerogatives. Yet there is not a shred of evidence that Congress intended to confer monopoly privileges on insurers and their cohorts to run roughshod over any industry with which they do business.

Similarly, there is no support for such a contention in this Court's *National Securities* opinion. The "business of insurance" dicta there simply mirrors Congressional understanding of the "business of insurance" with its roots in the S.E.U.A. litigation:

> Certainly the fixing of rates is part of this business; that is what South-Eastern Underwriters was all about. The selling and advertising of policies, ...and the licensing of companies and their agents. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the "core" of the "business of insurance." [393 U.S. at 460.]

There is nothing in the Court's language that deviates from the Congressional concept of a wholly intra-insurance industry application.

Petitioners' effort to expand the Court's unequivocal focus on the insurer-insured relationship to the insurer-*supplier*-insured relationship is further refuted later in the opinion. In upholding the concurrent application of federal securities laws and state insurance regulation to the merger of two insurance companies, the Court explained:

> [T]he remedy the [Securities and Exchange] Commission seeks does not affect a matter predominantly of concern to policyholders alone; the merger is at least as important to those owning the companies' stock as it is to those holding their policies. [*Id.* at 463.]

The Court thus held that the McCarran Act was aimed at preserving state regulation of the "business of insurance" that "predominantly concern[s] policyholders alone," and that different principles apply when the activity is of equal importance to non-policyholders. Since trade restraints imposed on industries outside insurance are at least of equal importance to those industries as to policyholders, Petitioners have mistakenly relied upon *National Securities* for the near blanket antitrust exemption they seek. Accord *Zelson v. Phonix Mutual Life Ins. Co.,* 549 F. 2d 62 (8th Cir. 1977).

Hence the "business of insurance" should be limited to its ordinary meaning and not extended to businesses Congress never considered state insurance departments authorized or qualified to regulate.

D. Regulation of Blue Shield's Pharmacy Policies By the Texas State Board of Insurance Is Confined To the Insurer-Insured Relationship and Does Not Implement Any State Policy To Suppress Competition In the Pharmacy Market.

Regulation of Blue Shield's prescription drug policies by the Texas State Board of Insurance constitutes traditional insurance regulation directed at the insurer-insured relationship and does not manifest a state policy to restrain trade in the competitive retail drug market.

The keystone in Petitioners' attempt to show a state commitment to suppressing competition in the pharmacy market is the Texas provision for the prior approval of health insurance policies. Pet. Brief 31-35. In their zeal to find a state policy where none exists, they have misconstrued the purpose of prior approval provisions and are betrayed by their own argument. Policy approval provisions are a traditional form of insurance regulation aimed at protecting policyholders by standardizing complex insurance policies. See generally R. Keeton, *Basic Text on Insurance Law* 68-73 (1971). Texas initially rejected Blue Shield's participating pharmacy program solely because of its impact on policyholders, or in Petitioners own words, because of its *"alleged discrimination between insureds* who patronized participating pharmacies and those who patronized non-participants." Pet. Brief 33-34. (Emphasis added.) In a remarkable display of alchemy, Petitioners claim that protecting policyholders is "similar" to protecting competition in the pharmacy market. *Id.* at 34. Neither the original disapproval or

the later approval of Blue Shield's pharmacy program by the Texas State Board of Insurance manifested a state policy to suppress competition in the pharmacy market.[17]

17 Petitioners' attempt to bolster their position by citing both the state's antitrust law and unfair competition provision to argue that anticompetitive effects on non-insurance markets were mandated by the state. Petitioners' reliance on these antitrust laws is misplaced. First, it appears from Petitioners' own account that the State of Texas did not consider any antitrust violation to be involved, as evidenced by the Attorney General's inaction. Pet. Brief 34 n. 30. The State certainly could not compel anticompetitive conduct when it considered none to be present. Indeed, the insurance code's unfair methods of competition provision is confined to the business of insurance and does not encompass trade restraints in non-insurance businesses as alleged here. Second, the McCarran Act applies to insurance regulation and was not intended to confer upon the States exclusive antitrust jurisdiction over the insurance industry, let alone non-insurance industries doing business with insurers. State antitrust laws patterned on the federal antitrust laws, such as Texas' unfair methods of competition provision and general antitrust law, are not "statutes aimed at protecting. . .[the insurer-insured] relationship" and therefore are irrelevant to the McCarran Act. *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). Cf. *FTC v. National Casualty Co.*, 457 U.S. 560 (1958), where precisely the kind of insurance regulatory law covered by the McCarran Act was involved -- prohibiting insurers from using deceptive practices with insureds. Even if state antitrust laws were within the McCarran Act's reach, the fundamentally federalist purpose and specific section 2(b) standards of the Act call for *concurrent* federal and state antitrust authority. Federal antitrust laws hardly "invalidate, impair, or supersede" state antitrust laws patterened on their federal counterparts. The lower court cases to the contrary cited by Petitioners lack supporting analysis and violate the McCarran Act's purposes and this Court's precedent. See Weller, "To Preempt or To Accommodate: The Question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act, *Toledo L. Rev.* (forthcoming).

This Court has already held that the mere approval of conduct not compelled by state policy is insufficient to trigger McCarran Act immunity from federal law. In *National Securities*, the Arizona insurance comissioner approved a merger between two insurance companies as having no adverse impact on policyholders. Applying the McCarran Act's federalist purposes, this Court held that the state insurance department's approval of the merger was not "invalidated, impaired, or superseded" by the concurrent application of federal securities laws:

> Arizona has not commanded something which the federal government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so. [393 U.S. at 463.]

The federalist nature of the McCarran Act, recognized in *National Securities*, similarly applies here. See n.9, *supra*. Texas' approval of Blue Shield policies for their impact on *policyholders* is not impaired by the concurrent application of the federal antitrust laws for their impact on the pharmacy market.

The analogy of the instant case to this Court's recent *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) ruling on the *Parker* doctrine is striking and should be controlling. [18] There, as here, the defendant allegedly devised and imposed an anticompetitive scheme on an unregulated market. There, as here, the defendant claimed antitrust immunity because a state agency regulating one industry had purportedly "approved" the

18 The analogy of the *Parker v. Brown* doctrine involved in *Cantor* is especially strong since there is significant evidence that, as the NAIC put it, the McCarran Act's "Section 2(b) is essentially an enunciation of the *Parker v. Brown* decision." NAIC, *Monitoring Competition* 27 n. 58 (1974).

Apparently deeply troubled by the close relation of the *Parker* doctrine and McCarran Act section 2(b), Petitioners try valiantly to distinguish the two. Pet. Brief 17-19 n. 14. They even go so far as citing Senate Report 1112 and House Report 873, which related to the rejected total exemption bills and not to the fundamentally different NAIC Bill, S. 340, upon which the McCarran Act is based. The proviso clause in section 2(b) of the Act is strikingly similar to the *Parker* doctrine and could well have formed the basis for the compromise between the House and Senate versions of S. 340. See n.9, *supra* and Weller, *supra* n.4.

defendant's private proposal impacting on an unregulated market. [19] In holding no antitrust exemption was appropriate, this Court articulated a rationale that goes to the heart of this case:

> The Commission's approval of respondent's [Detroit Edison] decision to maintain such a program [providing free light bulbs] does not . . .implement any statewide policy relating to light bulbs.
>
> *There is no logical inconsistency between requiring . . . a [regulated] firm to meet regulatory criteria insofar as it is exercising its natural monoply powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.* [428 U.S. at 585, 595-96. (Emphasis added.)]

Unlike state rating bureau legislation where the state's clear intention is to substitute regulation for competition, the Texas policy approval provision, which is the keystone of Petitioners' regulation argument, does not evidence any state policy to displace competition in the essentially unregulated pharmacy market. The Texas policy approval provision is only aimed at the insurer-insured relationship, and thus further demonstrates that the alleged trade restraints imposed on the pharmacy market are beyond the "business of insurance."

E. Blue Shield's Alleged Combination With Persons Not Engaged in the Business of Insurance To Restrain Trade in The Pharmacy Market Is Not Entitled To McCarran Act Protection.

Congress' unambiguous intention of restricting the reach of the McCarran Act to the insurance industry is also expressed in Section 2(a)'s language limiting the Act to "every person engaged" in the "business of insurance." It is inconceivable that

19 Absent express immunization or its equivalent, it is generally well established that private business arrangements are not exempt from the antitrust laws merely because a regulatory agency approved them. See, e.g., *U.S. v. Radio Corp. of America*, 358 U.S. 334, 353 (1959), *California v. FPC*, 369 U.S. 482 (1962), *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963), *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 372 (1973) and cases cited in *Cantor, supra*, at 592-93 nn. 26-30.

Congress considered pharmacists to be engaged in the business of insurance. Nevertheless, Petitioners would have this Court rewrite the McCarran Act to deal with claimed changed circumstances. As Mr. Justice Harlan has observed, a statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *U.S. v. Sisson*, 399 U.S. 267, 297 (1970).

Faced with section 2(a)'s express exclusion of pharmacists from the McCarran Act, Petitioners rely on inapposite analogies in an attempt to find ambiguity where there is none. Petitioners incorrectly argue that conduct and not the identity of the parties is used to determine the scope of statutory antitrust exemptions. Pet. Brief 36-37. The law is clear, however, that the statute controls whether conduct, the parties, or both are relevant to determining the scope of an antitrust exemption. As the Court's recent decision in *National Broiler Marketing Assn. v. U.S.*, 46 U.S.L.W. 4620 (June 13, 1978), dramatically illustrates, the identity of the parties can be decisive to the applicabilty of an antitrust exemption. There Capper-Volstead immunity was not appropriate because certain persons were not "farmers" as required by the statute. Similarly, McCarran Act immunity is inapplicable here because pharmacists are not "persons engaged" in the "business of insurance" as required by the Act.

The District Court's opinion in this case is the first ruling in the McCarran Act's 31 year history that persons not engaged in the insurance business, pharmacists, are nonetheless entitled to the Act's antitrust exemption. This unwarranted extension of the McCarran Act means that an insurer could combine with anybody in virtually any industry to restrain trade outside the insurance business. It is wholly at odds with Congress' unambiguous language and purpose of limiting the McCarran Act to the "business of insurance" alone.

As in other areas where normally exempt entities combine with non-exempt entities to restrain trade in non-exempt markets, Congressional intentions require this Court to deny all Petitioners McCarran Act protection. See, e.g., *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945) (labor exemption) and *National Broiler Marketing Assn. v. U.S., supra*, (agricultural cooperatives exemption). Accord *Hill v. National Casualty Co.*, 1971 Trade Cases paragraph 73, 594 (N.D. Calif.).

II.

Cost Containment Measures By Health Insurers And By State Insurance Departments Will Flourish Without McCarran Act Protection

Petitioners and several *amici curiae* have gone to great lengths predicting the demise of state insurance department regulation of health insurance and of aggressive cost containment by health insurers if the "business of insurance" language of the McCarran Act is not interpreted to immunize inter-industry restraints of trade. Petitioners passionately proclaim that the states will be "effectively prevent[ed] . . . from fostering the use of cost containment measures..." and that "insurers could no longer employ any method . . . of keeping health insurance premiums down by containing health care costs." Pet. Brief 39. These doomsday prophecies are completely unfounded in law and fact.

First, aggressive cost containment measures by a health insurer need not violate the antitrust laws. As the Blue Shield Association's ("BSA") *amicus* brief shows, it is doubtful that the participating pharmacy contract actually violates the antitrust laws. BSA Brief 28-35. The U.S. Department of Justice found no antitrust violations in similar programs after an extensive analysis. Third Party Prepaid Prescription Drug Programs: *Hearings Before The Subcomm. on Environmental Problems Affecting Small Bus., H. Select Comm. on Small Bus.*, 92d Cong., 1st Sess., 227 (1971) (testimony of Bruce Wilson) & BSA Brief. App. D-F. The Texas Attorney General saw no antitrust violation. Pet. Brief 34 n.30.

At least three courts have ruled specifically that similar health care cost containment measures do not violate the antitrust laws. *Webster County Memorial Hosp., Inc. v. United Mine Workers*, 1976-1 Trade Cases paragraph 60, 896 (D.C. Cir.); *Anderson v. Medical Service of D.C.*, 1976-1 Trade Cases paragraph 60, 884 at 68, 857-58 (E.D. Va.), aff'd. mem. 551 F. 2d 304 (4th Cir. 1977) and *Travelers Ins. Co. v. Blue Cross of W. Pa.*, 481 F.2d 80, 84 (3d Cir. 1973). Notwithstanding the Fifth Circuit's dicta to the contrary in *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375, 1382 (1977), the suggestion that that antitrust laws impose a passive role on health insurers is simply incorrect. As the Third Circuit observed in *Travelers*, the antitrust laws promote and do not prohibit health insurer cost containment:

> *In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible.* This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned. [481 F. 2d at 84. (Emphasis added.)]

It is true health care providers can be expected to resist cost containment initiatives of private health insurers by filing dubious antitrust cases and by taking other action. This Court has never expanded antitrust exemptions simply because unhappy plaintiffs may be filing non-meritorious antitrust cases, and should not do so now.

Furthermore, the threat of these lawsuits will not eliminate insurer cost containment as Petitioners and several *amici* predict. The tremendous market demand today for insurer cost containment evidenced by the numerous *amici* briefs filed by employers and unions poignantly demonstrates that health insurers will continue to provide a wide range of cost controls that do not violate the antitrust laws.

On the other hand, it is conceivable that some insurers may go too far and monopolize or restrain trade in health care markets. In such instances, nothing in the McCarran Act nor sound public policy mandates that health care providers should be victimized by truly monopolistic practices. There are many things insurers can do to contain costs without violating the antitrust laws.

Second, since the McCarran Act was solely intended to cover state insurance department regulation of the insurance business, it is not applicable to Petitioners and the Texas State Board of Insurance. At the same time *Parker v. Brown*, 317 U.S. 341 (1941) and its progeny make abundantly clear that states may use their insurance departments or other regulatory agencies to substitute regulation for competition in most businesses -- insurance, pharmacy, hospital or others -- without disruption or preemption by the federal antitrust laws. For example, in *Frankford Hospital v. Blue Cross of Greater Philadelphia*, 554 F. 2d

1253 (3d Cir. 1977), Pennsylvania compelled Blue Cross to contain hospital costs in a manner alleged to violate the antitrust laws. In that case *Parker* immunity for Blue Cross would have been appropriate.

If states choose to regulate other businesses through their insurance departments, then the *Parker* doctrine rather than the McCarran Act provides the proper standard for determining antitrust immunity and certainly protects state initiated programs to contain the rapidly increasing costs of health care.

CONCLUSION

The Fifth Circuit's decision interpreting the "business of insurance" should be affirmed. Extending the McCarran Act to immunize an alleged Blue Shield-pharmacy conspiracy to restrain the pharmacy market would violate Congress' unmistakable intention of confining the Act to the insurance business and those engaged in it. It would also be unnecessary, since the *Parker* doctrine and ordinary antitrust principles fully promote and protect legitimate cost containment efforts by health insurers and the states.

Respectfully submitted,

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